Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MARTIN DROZ, PETITIONER

v.

PETER J. MCCADDEN, STATE TROOPER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDWARD E. KOPKO

Edward E. Kopko, Lawyer, P.C.
308 N. Tioga Street
Ithaca, NY 14850
(607)272-0479

DENNIS P. DERRICK
Counsel of Record

7 Winthrop Street
Essex, MA 01929
(978) 768-6610

CURRY & TAYLOR • 202-393-4141

QUESTION PRESENTED

When the court of appeals *creates* new facts which fundamentally *change* the summary judgment record below to conclude that respondent had probable cause to arrest petitioner, has it overstepped its role as a reviewing court, undermined summary judgment procedure and denied petitioner due process of law?

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OPINIONS BELOW

The published but unreported *per curiam* decision of the United States Court of Appeals for the Second Circuit in *Martin Droz v. P.J. McCadden*(C.A. No. 08-0241), decided September 14, 2009, reversing the District Court's Memorandum and Order refusing to grant a qualified immunity to respondent McCadden for damages for false arrest in this civil rights action, instead concluding that respondent did have probable cause to arrest petitioner, is set forth in the Appendix hereto(App. 1-7).

The published Memorandum-Decision and Order of the United States District Court for the Northern District of New York, in *Martin Droz v. Estate of Anderson et al.*(Civil Action No. 6:05-CV-939), decided January 7, 2008, and reported at 529 F. Supp. 2d 368(N.D.N.Y. 2008) and 2008 US Dist. LEXIS 3478, refusing to grant a qualified immunity to respondent in petitioner's civil rights action for damages on account of respondent's arrest of petitioner without probable cause, is set forth in the Appendix hereto(App. 8-19).

The unpublished order of the United States Court of Appeals for the Second Circuit in *Martin Droz v. P.J. McCadden*(C.A. No. 08-0241), filed on November 3, 2009, denying petitioner Martin Droz's timely filed petition for rehearing with suggestion for rehearing *en banc*, is set forth in the Appendix hereto(App. 20).

JURISDICTION

The decision of the Second Circuit Court of Appeals reversing the District Court's refusal to grant

a qualified immunity to respondent McCadden in petitioner's civil rights action for damages was entered on September 14, 2009; and its order denying petitioner Martin Droz's timely filed petition for rehearing with suggestion for rehearing *en banc* was filed on November 3, 2009(App. 1;20). This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of petitioner Martin Droz's timely filed petition for rehearing with suggestion for rehearing *en banc*. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the

> right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV, Section 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. Section 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. Section 1343(a)(3) & (4):

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> ...
>
> (3) To redress the deprivation, under color of any Statelaw, statute, ordinance, regulation, custom or usage, of of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the

jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Civil Rights Act–42 U.S.C. § 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Civil Rights Act–42 U.S.C. § 1986:

> Every person who, having knowledge that any of the wrongs conspired to be done..., are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented....

Fed. R. Civ. P. 56(c) and (e)(2):

> **(c). Serving the Motion; Proceedings.**
> ....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
> ....
> **(e)(2). Affidavits; Further Testimony.**
> ....*Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

STATEMENT

On October 12, 2005, petitioner Martin Droz ("petitioner" or "Droz") filed an amended complaint in the federal district court for the Northern District of New York against respondent State Trooper Peter J. McCadden ("respondent" or "McCadden") and Vienna Town Justice Shirley B. Herder ("Herder") seeking damages against them in their individual capacities under 42 U.S.C. § 1983, for false arrest, malicious prosecution, a denial of equal protection of the laws and for conspiracy to violate his constitutional rights(App.

9). Petitioner also alleged that Vienna Town Zoning Officer John C. Anderson ("Anderson") violated his constitutional rights by seeking to prosecute him for allegedly disobeying the Town of Vienna zoning ordinance(*Id.*). Petitioner posited the jurisdiction of the district court on 28 U.S.C. §§ 1331 and 1343(a)(3) & (4).

Specifically, in this five-count complaint, petitioner sought money damages under § 1983 for Anderson's malicious prosecution(Count One), respondent McCadden's unlawful arrest, malicious prosecution and a denial of the equal protection of the laws(Counts Two-Four), and for conspiracy by respondent McCadden and Herder to carry out his false arrest, their malicious prosecution of petitioner and the denial of his constitutional rights(Count Five)(App. 9;12-14). After Anderson died on January 24, 2005, petitioner's action was continued against his estate(App. 9).

The events giving rise to petitioner's suit took place on August 13, 2002(App. 9-10). Charged in a criminal complaint by Anderson with having installed an "illegal sewage disposal system" on his property, petitioner appeared at Vienna Town Hall on that day, as ordered to do so by Town Justice Herder, to answer the complaint which consisted of three permit violations(*Id.*). Anderson was also present. Petitioner carried with him an open paper shopping bag containing a tape recorder and a notepad(*Id.*). Outside of court and before petitioner's proceedings began, Anderson approached petitioner and asked him "what's in the bag?"(*Id.*). Petitioner made no attempt to conceal the contents of his bag but did not respond to Anderson's inquiry, an innocuous exchange which

contained no threats by anyone and which caused no disruption in the Town Hall or to any of the court processes(*Id.*).

As the operative facts supporting petitioner's suit emerged during discovery, the events of August 13, 2002, following this exchange between petitioner and Anderson crystallized. Before Herder convened court for petitioner's case, Anderson met with Herder and stated in an *ex parte* conversation with her that petitioner had declined to disclose the contents of the shopping bag he was carrying(App. 10). Anderson suggested that petitioner be reported immediately to the State Police and Herder agreed(*Id.*). The State Police were contacted and respondent Trooper McCadden was dispatched to the Vienna Town Court(*Id.*).

Respondent Trooper McCadden averred in his affidavit that he had a conversation with Herder upon arriving at Town Hall which is the Town courtroom when court is in session(App. 10). According to respondent, Herder told him that she had held petitioner in contempt of court and she directed respondent to arrest petitioner(*Id.*). Armed with this information, respondent approached petitioner in the Town Hall, arrested him, placed him in handcuffs and determined that the shopping bag he carried contained only a tape recorder and a notepad(*Id.*). Respondent never told petitioner the reason for his arrest; and he then transported petitioner to State Police Barracks in Sylvan Beach for processing(*Id.*).

Respondent further averred that during petitioner's detainment at the State Police Barracks, he

talked with Herder at Town Hall on the telephone to discuss under which subsection of the criminal contempt statute he should charge petitioner(*Id.*). They agreed that petitioner should be charged under New York Penal Law § 215.50(1) for criminal contempt, a statute which proscribes "[d]isorderly ...behavior, committed during the sitting of the court...directly tending to interrupt its proceedings or to impair the respect due to its authority."(*Id.*). Respondent only decided to charge petitioner after this *ex parte communication* with Herder at Town Hall and he—*not* Herder nor anyone else at Town Hall—filled out and signed the criminal contempt information charging petitioner with violating this subsection of the Penal Law even though respondent knew that the contents of petitioner's shopping bag was harmless and that petitioner had not acted contemptuously in his presence(*Id.*).

In her sworn deposition testimony, however, Herder's account of petitioner's arrest was dramatically different from respondent's version in several crucial respects. According to Herder, she did not observe any contemptuous conduct by petitioner in the Town Hall; she did not summon the State Police to arrest him; she did not tell respondent to arrest petitioner in the Town Hall, "either directly or indirectly;" and she insisted that she was not the complainant providing the basis for the contempt charge(*Id.*). Herder claimed that if she spoke to respondent at all, it was when he called her from the state Police Barracks to consult her about the proper subsection of the New York Penal Law with which to charge petitioner(App.10;14).

Petitioner was returned to the Vienna Town Court later the same evening for arraignment on this charge of criminal contempt(App. 10-11). Herder refused to disqualify herself even though she might be called as a witness on this contempt charge and had conferred *ex parte* on the matter with respondent, petitioner's adversary in this proceeding and the arresting officer(App. 11). At the arraignment, Herder committed petitioner to the Oneida County Jail for two weeks in lieu of $500 cash bail even though New York law requires that bail be set in more than one form and despite the fact she knew that the contents of his shopping bag was harmless, that petitioner had not disrupted any court proceedings and had not been otherwise contemptuous of the court(*Id.*).

Respondent transported petitioner to the Oneida County Jail and delivered him to the custody of the Sheriff of Oneida County(*Id.*). Petitioner was incarcerated in the Oneida County Jail from August 13, 2002, to August 27, 2002(*Id.*).

When petitioner was returned from his incarceration to Herder at the Vienna Town Court on August 27, 2002, to answer the pending criminal contempt charge, petitioner was ostensibly represented by a public defender who agreed to a disposition of the criminal charge by adjournment in contemplation of dismissal; and petitioner was released from custody(*Id.*). However, petitioner claimed that he never agreed to be represented by a public defender and never consented to a disposition of the charge via adjournment in contemplation of dismissal(App. 11;15). In fact, petitioner averred in his deposition testimony that no one ever mentioned to him an adjournment in

contemplation of dismissal as a disposition of this case and he was unaware of this disposition.

Three days later, on August 30, 2002, Herder disposed of the contempt charge against petitioner by adjournment in contemplation of dismissal *without the understanding, consent or knowledge of petitioner*(*Id.*). Anderson subsequently withdrew one of the three pending zoning violations against petitioner, thus disposing of this charge in petitioner's favor; and Herder eventually disqualified herself from hearing the two outstanding zoning violations against him(App. 11). On August 14, 2004, the State of New York's Judicial Conduct Commission investigated Herder's handling of this matter and publicly censured her for her conduct(*Id.*).

With this discovery having taken place, defendants moved for summary judgment under Fed. R. Civ. P. 56(c) contending that they all were entitled to a qualified immunity from liability for damages under § 1983(*Id.*). Petitioner opposed the motion as to respondent McCadden and Herder but did not oppose the motion as to the Estate of Anderson(*Id.*).

Petitioner's Statement of Material Facts in opposition to defendants' summary judgment reflected the irreconcilable conflict in the description of the operative facts offered by respondent McCadden and Herder, respectively, in their sworn testimony. Referring to respondent McCadden's deposition testimony, petitioner proffered at Paragraph Four thereof:

> Prior to arresting Droz, McCadden conducted no investigation of any kind and relied upon his alleged understanding of Herder's direction to him to arrest Droz for criminal contempt in the second degree(McCadden Deposition, page 35,45).

(App. 4-5).

Petitioner referenced respondent's deposition testimony for this material fact because it vividly contains the claim of respondent---consistent with his own affidavit---that the only reason he arrested petitioner on August 13, 2002, was because Herder directed him to do so, *a claim by respondent which Herder's own deposition testimony hotly disputes*(App. 10;14).

In addition, Paragraph 12 of petitioner's Statement of Material Facts relies upon Herder's own submission before the New York Commission on Judicial Conduct during its investigation of her conduct in this matter:

> Prior to the convening of the court, Mr. Anderson met with Herder in her office and, in an *ex parte* conversation, alleged that Droz had declined to disclose to him the contents of the shopping bag he was carrying. Herder agreed with Mr. Anderson that Droz should be reported to the State Police.

(App. 5).

With the summary judgment materials in this posture, the district court, Hurd, J., issued its Memorandum-Decision and Order on January 7, 2008(App. 8-19). The district judge first dismissed petitioner's claim against the Estate of Anderson because petitioner did not oppose its summary judgment motion(App. 9;18). Turning to respondent's claim that he was entitled to a qualified immunity for the claim of false arrest because he had probable cause to arrest petitioner based upon his conversation with Herder when he arrived at Town Hall wherein she told respondent that she had charged petitioner with criminal contempt and that he should arrest petitioner, the district court determined that a genuine issue of material fact exists on this score(App. 14-15).

That is, viewing the summary judgment facts in the light most favorable to petitioner, the non-movant, as he was required to do on this motion, Judge Hurd found that "Herder's account of the incident must be credited"(App. 14). As he properly found, according to Herder's own sworn testimony,

> she did *not* observe [petitioner's] conduct, she did *not* summon the State Police, she did *not* direct Trooper McCadden to arrest plaintiff, and she was *not* the complainant providing the basis for the contempt charge.

(*Id.*)(emphasis supplied). The motion judge therefore concluded from these summary judgment materials that under Herder's version of the circumstances leading up to petitioner's arrest, "it could not be said that Trooper McCadden had probable cause to arrest Droz"(*Id.*). Moreover, this conclusion was supported by

respondent's own admissions that he did not observe contemptuous behavior by petitioner and that he determined immediately after handcuffing petitioner that the tape recorder and notepad contained in his shopping bag were not dangerous(App. 14-15).

For these reasons, the district judge ruled that petitioner raised a genuine issue of material fact for trial as to whether respondent had probable cause to arrest him; and if a jury should find that probable cause did not exist, it could find respondent liable for false arrest(App. 15).

As for petitioner's claim of malicious prosecution, Judge Hurd reasoned that since petitioner never agreed to an adjournment of the contempt charge against him in contemplation of dismissal, there was a genuine issue of material fact for trial whether this disposition (which could defeat a malicious prosecution claim) was a valid one thereby entitling petitioner to a trial on his claim of malicious prosecution(*Id.*). Moreover, viewing the summary judgment record in the light most favorable to petitioner and making all inferences in his favor, especially Herder's version of events which must be credited and which shows that there was no evidence that petitioner had committed a criminal contempt, "a reasonable jury could infer that McCadden acted with the required malice" when he swore out the contempt complaint upon which petitioner was arraigned, thus initiating the prosecution(App. 16-17).

The district court also ruled that because petitioner had adduced no facts to show how he was treated differently from someone similarly situated, his

equal protection claim must be dismissed (App. 17). Finally, as for petitioner's claim of conspiracy between respondent and Herder to violate his constitutional rights, the motion judge ruled that these triable jury questions of respondent's false arrest and his malicious prosecution made viable petitioner's further claim that McCadden and Herder had conspired against petitioner to violate his constitutional rights(App. 17-18). As the lower court put it, petitioner "has set forth facts, again taken in the light most favorable to him, sufficient to withstand summary judgment on the conspiracy claim[], such as the multiple *ex parte* conversations between McCadden and Herder both prior to and subsequent to [petitioner's] arrest." (App. 18).

In the aftermath of this decision, Herder settled with petitioner on his claims against her and this part of petitioner's amended complaint pertaining to Herder was discontinued in the district court. However, respondent McCadden appealed Judge Hurd's decision to the court of appeals and in a *per curiam* decision of September 14, 2009, it reversed the district court's ruling and remanded the matter to the lower court with instructions that respondent's motion for summary judgment be granted and that petitioner's remaining claims against respondent be dismissed(App. 1-7).

Employing *de novo* review, the court of appeals determined from the summary judgment materials adduced below that respondent had a reasonable belief that he was operating at the direction of Herder when he arrested petitioner(App. 2;4).That is, regardless of whether Herder and respondent McCadden actually spoke to one another before McCadden arrested petitioner, a fact the district judge found genuinely in

dispute, the court of appeals concluded that respondent "reasonably believed he was acting at Herder's behest"(App. 4).

In order to reach this conclusion---one entirely at odds with Herder's own emphatic sworn deposition testimony that she did not observe any contemptuous conduct by petitioner in the Town Hall, did not summon the State Police to arrest him, did not tell respondent directly or indirectly to arrest petitioner in the Town Hall and was not the complainant for the criminal contempt charge----the court of appeals considered Paragraph Four of petitioner's Statement of Material Facts which reads:

> Prior to arresting Droz, McCadden conducted no investigation of any kind and relied upon his *alleged understanding* of Herder's direction to him to arrest Droz for criminal contempt in the second degree(McCadden Deposition, page 35,45).

(App. 4-5)(emphasis supplied). It construed petitioner's choice of the words "alleged understanding" by respondent in this Paragraph of his Statement of Material Facts as an *admission* or *concession* on petitioner's part that respondent "thought he was operating at the direction of Herder when he arrested Droz"(App. 5).

The court of appeals made this factual conclusion despite the fact that petitioner used the word "alleged" to signify the declared *but not proven* nature of this "understanding" by respondent and then referenced respondent's deposition testimony for this material fact

because it vividly contains his declared *but unproven* claim---consistent with his affidavit----that the only reason he arrested petitioner on August 13, 2002, was because Herder directed him to do so, *a claim which Herder's own sworn deposition testimony hotly disputes*(App. 10;14). In a footnote, the court of appeals dismissed petitioner's use of the term "alleged" in his Statement of Material Facts because "it is hard to know what to make of the use of [this] word...[and because] it does not take away from Droz's admission that McCadden had *some* understanding that Herder had instructed him to arrest Droz"(App. 7)(emphasis in original).

The court of appeals bootstrapped this attenuated construction of petitioner's use of the phrase "alleged understanding"—i.e., a declared but unproven fact—into a concession of proven fact by petitioner that respondent thought that he was acting at Herder's direction when he arrested petitioner. It then concluded as a matter of law that respondent believed he was acting at Herder's behest when he arrested petitioner, making the arrest reasonable in the circumstances:

> Regardless of whether there is a triable issue of fact as to whether McCadden had a personal conversation with Herder prior to the arrest, then, for McCadden to have understood that Herder directed him to arrest Droz, he must have been told so directly or indirectly on or as a result of the [telephone] call—the basis for a reasonable belief [on his part] that it was so.

(App. 5).

This conclusion of fact by the court of appeals, a gross speculation and revision of the summary judgment record adduced in the district court, is directly controverted by Herder's emphatic assertion that she never told McCadden either directly or indirectly to arrest petitioner and ignores entirely the core principle of summary judgment procedure that petitioner----*not* McCadden----was entitled to all favorable inferences from the facts developed by this record, most notably Herder's direct contradiction of McCadden's own version of the operative events. That Herder may have agreed with Anderson that petitioner "should be reported to the State Police" does not under any construction of this fact constitute a direction by Herder or anyone else in Town Hall that respondent should arrest petitioner(*Id.*).

Yet the court of appeals concluded based on these "stipulated facts" that respondent as a matter of law reasonably believed that Herder instructed him to arrest petitioner, establishing in its eyes arguable probable cause for petitioner's arrest, entitling respondent to a qualified immunity defense to petitioner's claim of false arrest(App. 5-6).

The court of appeals further determined that since respondent's arrest was based on arguable probable cause and because respondent spoke to Herder before filing the charge of criminal contempt against petitioner at the State Police Barracks, there was probable cause for him to institute the proceeding against petitioner therefore entitling him to the defense of a qualified immunity to petitioner's malicious prosecution claim(App. 6). Finally, since neither of these underlying § 1983 claims had been established,

petitioner's conspiracy claim should also be dismissed(*Id.*). It therefore directed the lower court to enter summary judgment in respondent's favor on all counts of petitioner's amended complaint(App. 7).

On November 3, 2009, the court of appeals denied petitioner's timely filed petition for rehearing with suggestion for rehearing *en banc*(App. 20).

REASONS FOR GRANTING THE PETITION

By Creating New Facts Which Change Fundamentally The Summary Judgment Record Below To Conclude That Respondent Had Probable Cause To Arrest Petitioner, The Court of Appeals Overstepped Its Role As A Reviewing Court, Undermined Summary Judgment Procedure And Denied Petitioner Due Process Of Law.

This Court in its superintendency role over the federal courts and the federal system is responsible for making rules for hearings and motions under the Federal Rules of Civil Procedure so that these rules provide the parties with due process under the fifth amendment in their reach and result. *Klapprott v. United States*, 335 U.S. 601, 611 (1949) (Black, J.) citing *McNabb v. United States*, 318 U.S. 332, 341(1943).

In fulfilling this duty, the Court has enunciated two core principles attendant to the resolution of a motion for summary judgment under Rule 56: (1) in construing the materials adduced by the parties incident to respondent's motion for summary judgment motion, both the district judge and the court of appeals

are bound to draw all reasonable inferences from these materials *against* respondent as the moving party and *in favor* of petitioner as the non-moving party; and (2) they were also required to resolve all credibility questions *in favor* of petitioner, the non-moving party, because the role of the courts is only to determine whether there is a genuine issue of material fact for trial. *Beard v. Banks*, 548 U.S. 521, 529-530;534(2006). *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151(2000). *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-255(1986).

In contrast to the comprehensive analysis of the parties' summary judgment materials provided by the district court, the court of appeals failed to adhere to these two core principles. In the process, it created new facts which changed fundamentally the summary judgment record below in order to confect arguable probable cause for respondent to arrest petitioner when there was none, overriding countervailing facts—especially Herder's emphatic assertion that she never told respondent either directly or indirectly to arrest petitioner—to find that respondent "reasonably believed he was acting at Herder's behest"(App. 4). Its violation of these core principles took form in seven distinct ways on this record:

1. Construing the summary judgment materials *against* petitioner instead of in his favor, the court of appeals read Paragraph Four of petitioner's Statement of Material Facts about respondent's "alleged understanding" that he was acting at Herder's direction when he arrested petitioner as an admission or concession by petitioner that this alleged understanding by respondent was not only credible but

also an established fact on this record(App. 5).

The court of appeals made this factual conclusion despite the fact that petitioner used the word "alleged" to signify respondent's declared *but not proven* claim—consistent with his affidavit—that the only reason he arrested petitioner was because Herder directed him to do so, *a claim which Herder's own sworn deposition testimony hotly disputes*(App. 10;14). In order to dilute this contradiction between respondent and Herder, the court of appeals dismissed petitioner's use of the term "alleged" in his Statement of Material Facts because "it is hard to know what to make of the use of [this] word...[and because] it does not take away from Droz's admission that McCadden had *some* understanding that Herder had instructed him to arrest Droz"(App. 7)(emphasis in original).

This is an egregious act of unwarranted, creative appellate factfinding at odds with the plain meaning of the term "alleged," i.e., a declared but unproven fact, Herder's own sworn testimony to the contrary; and the core principles enunciated by this Court that all inferences drawn from the materials be construed in petitioner's favor, *not* against him. Moreover, its gross misreading of Paragraph Four of petitioner's Statement of Material Facts as a concession on petitioner's part that respondent had some "understanding" which prompted him to act as he did in arresting petitioner endows petitioner with the ability to know what Trooper McCadden believed or understood when he arrested petitioner, an absurd conclusion at odds with common sense and refuted by the unassailable fact that petitioner was in no position to know what respondent "understood" when he

arrested petitioner.

2. Again construing petitioner's Statement of Material Facts *against* him instead of in his favor, the court of appeals ignored the assertion immediately before the phrase "alleged understanding," i.e., petitioner's assertion that "[p]rior to arresting Droz, McCadden conducted no investigation of any nature...," an assertion of fact which, if established, would allow a jury to find, consistent with Herder's sworn testimony, that McCadden acted alone when he decided to arrest petitioner. This failure to confront the full import of Paragraph 4 of petitioner's Statement of Material Facts is unwarranted appellate factfinding by omission and violates the two core principles of summary judgment protocol set out by this Court.

3. Except for the court of appeals' unwarranted bootstrapping of its attenuated construction of petitioner's use of the phrase "alleged understanding"---i.e., a declared but unproven fact---into a concession of proven fact by petitioner that respondent thought that he was acting at Herder's direction when he arrested petitioner, there is *nothing* in the summary judgment record to support its bare speculation that respondent "must have been told [to arrest petitioner] directly or indirectly on or as a result of the call"(App. 5). In fact, this surmise is flatly contradicted not only by Herder's sworn testimony to the contrary but also by petitioner's assertion in his Statement of Material Facts that "[p]rior to arresting Droz, McCadden conducted no investigation of any nature...."(App. 4-5).

In addition, this conjecture by the court of appeals that respondent McCadden either "directly or indirectly" received direction to arrest petitioner is belied by Herder's sworn statement that she *never* directed McCadden to arrest petitioner at any time and by McCadden's sworn deposition testimony that *other than Herder's direct order to do so, he had no probable cause to arrest petitioner*(JA605). Accordingly, the court of appeals' conjecture that respondent McCadden either "directly or indirectly" received a direction to arrest petitioner is just that—conjecture—it cannot be supported on this record and cannot be harmonized with these contradictory assertions, a crucial conflict which a jury needs to resolve at trial.

4. The court of appeals' sheer speculation about why respondent arrested petitioner is contradicted by Herder's sworn testimony that she "never talked to McCadden prior to" his arrest and by petitioner's assertion in his Statement of Material Facts that "[p]rior to arresting [him], McCadden looked in the shopping bag and knew it contained papers and a tape recorder."

5. There is no support in this record for the court of appeals' surmise that respondent was told by anyone "indirectly" to arrest petitioner(App. 5). In fact, respondent's own sworn testimony is that he was told *directly* by Herder to arrest petitioner, an assertion which Herder unequivocally denies in her sworn testimony, creating a jury issue for trial as to the truth of these competing assertions.

6. The court of appeals' speculation that respondent may have been told "indirectly" to arrest

petitioner is further undermined by McCadden's own deposition testimony which concedes that other than Herder's *direct* order to do so, he had no probable cause to arrest petitioner(JA605).

7. Contrary to the core principle requiring the court of appeals to resolve all credibility questions in favor of petitioner, the non-moving party, the court of appeals resolved *in respondent's favor* the crucial credibility questions presented by the disputed versions between respondent and Herder about whether he was directed to arrest petitioner and whether respondent (who signed the complaint himself) rather than Herder was the true complainant for the criminal contempt charge against petitioner.

Instead of the court of appeals' attenuated reading of this record which denies petitioner his day in court, the overwhelming thrust of the summary judgment materials, when read with all reasonable inferences drawn *against* respondent as the moving party and *in favor* of petitioner as the non-moving party, raise genuine issues of material fact for trial that Herder never told respondent, directly or indirectly, to arrest petitioner; that respondent while arresting petitioner looked in petitioner's shopping bag and knew it contained papers and a tape recorder; and that respondent under the controlling precedents of this Court had no probable cause to arrest petitioner.

This perversion of the Rule 56 procedure by the court of appeals invokes the Court's power of superintendency over the federal courts and the federal system in order to reassert the lower courts' proper role in deciding summary judgment motions, i.e.,

reaffirming the holdings of *Beard*, *Reeves* and *Anderson* which require the court of appeals to draw all reasonable inferences in favor of the party opposing the motion for summary judgment and to refrain from making credibility determinations in order to resolve material factual disputes because this is a function of a jury, not a judge. *Beard v. Banks*, 548 U.S. at 555 (Ginsburg, J., dissenting).

The court of appeals' distended summary judgment analysis also works a denial of petitioner's right to a jury trial on the merits of his claims. The seventh amendment to the federal constitution provides that in suits at common law, "the right of trial by jury shall be preserved...." As Justice Scalia observed in *Blakely v. Washington*, 542 U.S.296, 305-306(2004), the right to a jury trial in civil cases is not a procedural formality but rather a fundamental "reservation of power in our constitutional structure," assuring the people's ultimate control of the judiciary. *Id.* citing 2 *The Complete Anti-Federalist* 315, 320(H. Storing ed.1981). This guaranty of a jury trial in the Constitution and the common law traditions it entrenches "do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury."*Id.* at 313 citing 3 Blackstone, *Commentaries*, at 373-374; 379-381.

Since one of the fundamental duties of the jury in civil cases is to resolve factual disputes bearing on material issues in controversy, the summary judgment procedure contained in Rule 56 does not violate a party's constitutional right to a jury trial because it is presumed that if the entry of summary judgment is appropriate, there are no genuine issues of material fact

for trial and therefore no right to a jury trial is implicated. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320(1902). See also *Pease v. Rathbone-Jones Eng. Co.*, 243 U.S. 273, 278-279(1917).

However, both federal jurists and legal commentators have noted that federal courts regularly overuse or abuse summary judgment procedure in order to take triable cases away from juries. Hon. W.G. Young, *Vanishing Trials–Vanishing Juries–Vanishing Constitution*, 40 Suffolk U. Law Rev. 67, 78(2006). Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. Law Rev. 982, 1064; 1066;1071-1072;1133-1134(2003). As Professor Miller observes, Rule 56's "paper trials" of disputed fact issues

> would be an unfortunate break with the past. Our civil dispute resolution system has always preferred adjudication based on oral testimony in open court subject to cross examination....[T]hey are considered aspects of what often is referred to as a "day in court," with due process embracing notions of a fair trial before an impartial tribunal.

Id. at 1072 & n. 476, citing *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197, 209(1958)("There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his case."). See also Thomas,

Suja A., *Why Summary Judgment Is Unconstitutional*, 93 Va. L. Rev. 139, 143-144;158-160;177-178(2007).

This abuse of summary judgment procedure has been documented. One scholar concludes that federal courts routinely weigh evidence, draw inferences in favor of the moving party and make credibility determinations. McGinley, Ann C., *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 229(1993). Likewise, courts often reject the plaintiffs' attempts to create inferences of intent and motive through a totality of circumstantial evidence, thereby creating a triable issue, by treating the evidence in a piecemeal fashion, isolating and rejecting as insufficient each of the discrete elements of the plaintiffs' evidence rather than considering their cumulative effect. *Id.* at 233-236.

Such is the case here. The procedure employed by the court of appeals denied petitioner his right to a jury trial in the district court on the triable fact questions of whether respondent Trooper McCadden had probable cause to arrest him, whether the adjournment in contemplation of dismissal was a valid one in view of the unrebutted fact that petitioner did not agree to this disposition and whether (because of these valid claims) Herder and respondent conspired to violate his constitutional rights. Petitioner deserves a jury trial on these crucial fact questions and denying him this opportunity is a denial of due process.

The federal guaranty of due process, including the right to a jury trial under the Seventh Amendment, extends to the judicial branch of government and the

way it decides a litigant's claims. *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 680 (1930). With any matter before it, the Supreme Court's concern is solely with the question whether petitioner as a federal litigant has been accorded due process in the primary sense, i.e., whether he

> had an opportunity to present [his] case and be heard in [his] support....Whether acting through its judiciary or through its legislature, a [government] may not deprive a person of all existing remedies for the enforcement of a right...unless there is, or was, afforded to [it] some real opportunity to protect it.

Id. at 681-682(Brandeis, J.)(footnotes omitted). Thus petitioner's cause of action and his right to have his claims fairly heard and decided in federal court is a valuable property right entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572(1972).

It matters not that this right to due process was not articulated with exact precision until petitioner filed its petition for panel rehearing with suggestion for rehearing *en banc*. Where a federal appellate court interprets the record before it in a way that was unforeseen" or "indefensible by reference to the law which had been expressed prior to the conduct in issue," in order to deny a litigant an opportunity to be heard on the substantive right affected, it violates that litigant's due process rights regardless of whether he has timely or properly raised this federal issue below. See, e.g., *Bush v. Gore*, 531 U.S. 98, 115(2000)(Rehnquist, C.J., concurring) (state court's

interpretation of its own election laws impermissibly distorted them beyond what a fair reading required); *Wright v. Georgia*, 373 U.S. 284, 289-291(1963)(breach of peace statute newly construed; violation of due process); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 457-458(1958)(state court's unexpected resort to new procedural rules at odds with prior practice to deny relief to alleged contemnors is a violation of due process). See also *United States v. Lanier*, 520 U.S. 259, 266 (1997) (due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope); *Marks v. United States*, 430 U.S. 188, 191-192(1977)(due process protects against judicial infringement of the "right to fair warning" that certain conduct will give rise to criminal penalties).

In reversing the district court ruling, the court of appeals has unexpectedly contorted the Rule 56 procedure, resorted to a demonstrably wrong factual predicate and created established facts where only disputed facts exist on this record. This unfair, unannounced and wrong reading of the record below is "indefensible by reference to the law which had been expressed prior to the conduct in issue,"*Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964); and it is so far beyond a "fair reading" of the record as to constitute a denial of due process. *Id.* at 354-355.

While a government may set the terms on which it will permit litigation in its courts, *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 552(1949), it cannot close the court house doors to litigants by denying them the opportunity to be heard on their claims––especially

civil rights claims against State actors--- which are available to them upon proper proof. The court of appeals' repudiation of these principles denies petitioner due process and a fair hearing on his claims.

CONCLUSION

For all of the reasons stated herein, a writ of certiorari should issue to review and vacate the judgment of the court of appeals, remand the matter to the district court for further discovery and a trial on the merits of the petitioner's claims against respondent; or to provide him with such other relief as is fair and just in the circumstances.

Respectfully submitted,

Edward E. Kopko
Edward E. Kopko, Lawyer, P.C.
308 N. Tioga Street
Ithaca, New York 14850
(607)272-0479

Dennis Derrick
Counsel of Record
7 Winthrop Street
Essex, MA 01929-1203
(978) 768-6610

(any footnotes trail end of each document)

Docket No. 08-0241-cv(L), 08-0567-cv(con)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARTIN DROZ, Plaintiff-Appellee,

– v. –

P.J. MCCADDEN, State Trooper, Defendant-Appellant,

SHIRLEY B. HERDER, MARK MURRAY, ESTATE OF JOHN C. ANDERSON, TOWN OF VIENNA, NEW YORK, DANIEL G. MIDDAUGH, SCOTT BURNOP, MICHAEL DURANT, SHAWN MALONE, MICHAEL MULKY, MARK SLAWSON, and UNKNOWN SOWITCH, Defendants. *

March 9, 2009, Argued
September 14, 2009, Decided

COUNSEL: DENISE A. HARTMAN, Assistant Solicitor General, for Andrew Cuomo, Attorney General of the State of New York, (Barbara D. Underwood, Solicitor General, Andrea Oser, Deputy Solicitor General, of counsel), Albany, NY, for Defendant-Appellant.

EDWARD KOPKO, Wiggins & Kopko, LLP, Ithaca, NY, for Plaintiff-Appellee.

Before: WINTER and SACK, Circuit Judges, and COGAN, District Judge. **

OPINION

PER CURIAM:

Defendant-Appellant State Trooper P.J. McCadden appeals from an order of the district court (David N. Hurd, *Judge*) denying his motion for summary judgment in this action against him under 42 U.S.C. § 1983 based on allegations of false arrest and malicious prosecution. The grounds for the motion are that McCadden was entitled to qualified immunity. We conclude that the stipulated facts establish that McCadden reasonably believed he was acting at the behest of Judge Shirley Herder. McCadden therefore had arguable probable cause to arrest Plaintiff Droz for criminal contempt. In addition, in light of this reasonable belief and McCadden's conversation with Judge Herder following Droz's arrest regarding the offense with which Droz would be charged, McCadden had probable cause to institute proceedings against him. We therefore reverse the order of the district court and remand the cause with instructions to grant the summary judgment motion and dismiss the claims.

BACKGROUND

Plaintiff Droz was arrested and charged with violating N.Y. Penal L. § 215.50(1) for "disorderly, contemptuous or insolent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings," after arriving at a courthouse and refusing to show to Code Enforcement Officer John C. Anderson what was in a brown paper bag he was carrying. Anderson told Judge Shirley Herder about the incident. The police were then summoned, and arrived, in the person of McCadden.

McCadden then arrested Droz. The subsequent contempt charge against Droz was eventually dismissed. Droz then brought this action pursuant to 42 U.S.C. § 1983 against Herder and McCadden asserting, *inter alia*, causes of action sounding in false arrest, malicious prosecution, and conspiracy to commit false arrest and malicious prosecution. Herder, having settled the claims against her, is no longer a party to this appeal.

McCadden moved for summary judgment on qualified immunity grounds, arguing that he had arguable probable cause to arrest Droz inasmuch as he had been told by Herder -- a town judge whose instruction would be sufficient to give probable cause to arrest someone for contempt of court – that he should arrest Droz for contempt. McCadden also argued that he was entitled to qualified immunity with respect to the malicious prosecution claim because it was undisputed that he spoke with Herder about what statute to charge Droz under following Droz's arrest.

The district court denied McCadden's motion for summary judgment, concluding that there was a material issue of fact as to whether Herder personally instructed McCadden to arrest Droz, and that, therefore, probable cause for the arrest had not been established as a matter of law. The court also decided that malice might be established to support the malicious prosecution claim because McCadden had no other evidence that Droz had committed criminal contempt, the charge that was brought against him and then dismissed. McCadden brings this interlocutory appeal from the denial of his motion for summary judgment.

DISCUSSION

I. Standard of review

"We review a district court's denial of summary judgment *de novo* . . . ." *Travelers Ins. Co. v. Carpenter*, 313 F.3d 97, 102 (2d Cir. 2002) (noting, however, that unlike appeals on qualified immunity issues, we typically undertake such review only "when a final decision or other distinct district court action has rendered the case appealable"). Summary judgment must be granted to the movant "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Roe v. City of Waterbury*, 542 F.3d 31, 35 (2d Cir. 2008). In an interlocutory appeal such as this one, "we may not review whether a dispute of fact identified by the district court is 'genuine.'" *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004). We may only resolve the summary judgment motion insofar as we rely "on stipulated facts, or on the facts that the plaintiff alleges are true, or on the facts favorable to the plaintiff that the trial judge concluded the jury might find." *Id.* "A district court's mere assertion that disputed facts exist . . . is[, however,] not enough to preclude an immediate appeal." *Id.*

II. Analysis

Irrespective of whether Herder and McCadden actually spoke to one another before Droz's arrest -- a fact the district court found was "genuinely" in dispute -- McCadden is entitled to qualified immunity, because we conclude, as a matter of law, that he reasonably believed he was acting at Herder's behest. While Droz contests whether such a personal conversation between

Herder and McCadden ever took place, he admits that "McCadden . . . relied upon his alleged understanding of Herder's direction to him to arrest Droz for criminal contempt." Droz Statement of Material Facts ¶ 4. [1] Droz concedes, then, that McCadden thought he was operating at the direction of Herder when he arrested Droz.

The stipulated facts also establish as a matter of law that this belief was reasonable. Droz concedes that Herder agreed with Code Enforcement Officer Anderson that Droz's actions in the courthouse should be reported to the police. *Id.* at ¶ 12. The police department, in the person of McCadden, were then summoned by telephone to the courthouse by the town supervisor. *Id.* at ¶ 13. While Droz does not explicitly agree that McCadden was told during or as a result of that phone call that Herder was instructing him to come to the courthouse to arrest Droz, for McCadden to have had any "alleged understanding," Droz Statement of Material Facts ¶ 4, that Herder had directed him to arrest Droz -- assuming as we must that he did not have a direct conversation with Herder – McCadden could only have been told that as a result of what the town supervisor told the police. Regardless of whether there is a triable issue of fact as to whether McCadden had a personal conversation with Herder prior to the arrest, then, for McCadden to have understood that Herder directed him to arrest Droz, he must have been told so directly or indirectly on or as a result of the call -- the basis for a reasonable belief that it was so.

"Arguable probable cause [which establishes qualified immunity with respect to a false arrest claim] exists when a reasonable police officer in the same circumstances and possessing the same knowledge as the offi-

cer in question *could* have reasonably believed that probable cause existed in the light of well established law." *Zellner v. Summerlin*, 494 F.3d 344, 369 (2d Cir. 2007) (internal quotation marks omitted) (emphasis in original). Based on the stipulated facts, as a matter of law, McCadden reasonably believed Herder instructed him to arrest Droz. This belief was sufficient to establish arguable probable cause for the arrest. McCadden is therefore entitled to qualified immunity on the false arrest charge.

Similarly, McCadden is entitled to qualified immunity on the malicious prosecution claim. "To state a claim . . . for malicious prosecution, a plaintiff must show: (1) that the defendant commenced or continued a criminal proceeding against him; (2) that the proceeding was terminated in the plaintiff's favor; (3) that there was no probable cause for the proceeding; and (4) that the proceeding was instituted with malice." *Kinzer v. Jackson*, 316 F.3d 139, 143 (2d Cir. 2003). It is undisputed that after having arrested Droz, McCadden spoke with Herder to determine what charges were to be brought. Inasmuch as McCadden arrested Droz on the reasonable belief that Herder instructed him to do so, and he spoke with Herder to determine the charge to be brought against Droz, we conclude that there was probable cause as a matter of law for instituting the proceeding. McCadden is therefore entitled to qualified immunity.

Because neither of the underlying section 1983 causes of action can be established, the claim for conspiracy also fails. *See Singer v. Fulton County Sheriff*, 63 F.3d 110, 119 (2d Cir. 1995).

CONCLUSION

For the foregoing reasons, the judgment of the district court is reversed and the cause remanded to the court with instructions that the motion for summary judgment be granted and Droz's remaining claims against McCadden be dismissed.

Footnotes

* The Clerk of the Court is instructed to amend the official caption in this case to conform to the listing of the parties above.

** The Honorable Brian M. Cogan, United States District Judge for the Eastern District of New York, sitting by designation.

1 While it is hard to know what to make of the use of the word "alleged" in Droz's Statement of Material Facts, we conclude that it does not take away from Droz's admission that McCadden had *some* understanding that Herder had instructed him to arrest Droz.

6:05-CV-939

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

MARTIN DROZ, Plaintiff,

-v-

ESTATE OF JOHN ANDERSON; SHIRLEY HERDER, in her individual capacity; and STATE TROOPER P.J. MCCADDEN; Defendants.

529 F. Supp. 2d 368; 2008 U.S. Dist. LEXIS 3478

January 7, 2008, Decided
January 7, 2008, Filed

COUNSEL: For Plaintiff: EDWARD E. KOPKO, ESQ., Ithaca, NY.

For Defendants Anderson & Herder: FREDERICK F. SHANTZ, ESQ., OF COUNSEL, SHANTZ & BELKIN, Latham, NY.

For Defendant McCadden: HON. ANDREW M. CUOMO, Attorney General for the State of New York, BRUCE J. BOIVIN, ESQ., OF COUNSEL, Ass't Attorney General, Albany, NY.

DAVID N. HURD, United States District Judge.

MEMORANDUM-DECISION and ORDER

I. *INTRODUCTION*

Plaintiff Martin Droz ("Droz" or "plaintiff") filed an amended complaint on October 12, 2005, asserting claims pursuant to 42 U.S.C. § 1983. Specifically, Droz alleges malicious prosecution by defendant Town of Vienna Zoning Officer John Anderson (deceased) ("Anderson"); false arrest, malicious prosecution, and violation of equal protection by defendant New York State Trooper Peter J. McCadden ("Trooper McCadden"); and conspiracy to commit false arrest, malicious prosecution, and denial of equal protection by Trooper McCadden and defendant Vienna Town Justice Shirley Herder ("Herder"), all in violation of his federal Constitutional rights.

Defendants moved for summary judgment. Plaintiff opposed as to Trooper McCadden and Herder, but did not oppose as to Anderson. Defendants' motions were taken on submission.

II. *FACTS*

The following facts are not in dispute unless otherwise noted.

On July 29, 2002, Anderson issued a zoning violation appearance ticket to Droz. Droz appeared in the Vienna Town Court, which is held in the Town Hall, before Herder on July 30, 2002. Plaintiff refused to speak. Herder adjourned the matter to August 13, and ordered plaintiff to obtain a permit to cure the alleged zoning violation. Between July 30 and August 13 Anderson took part in one or more ex parte communications with Herder regarding whether plaintiff had obtained the permit, and he issued two more appearance tickets to Droz. On August 13, Droz arrived for his court appearance carrying a brown paper shopping bag. Anderson approached plaintiff in the hallway of the

Town Hall and inquired as to what was in the bag. Plaintiff did not respond.

According to Droz, Anderson held yet another ex parte conversation with Herder to explain that Droz refused to identify the contents of his bag. Herder agreed that the State Police should be contacted. As a result of a telephone call from the town supervisor, Trooper McCadden responded to the Town Hall.

According to Trooper McCadden, he had a conversation with Herder upon arriving at the Town Hall. Herder told Trooper McCadden that she had held Droz in contempt of court. She directed Trooper McCadden to arrest plaintiff. Trooper McCadden approached Droz and determined that the bag held a tape recorder and a notebook. Droz was unresponsive and would not identify himself. Trooper McCadden took plaintiff into custody and transported him to the New York State Police Barracks. While there, Trooper McCadden consulted with Herder via telephone to discuss under which subsection of the criminal contempt statute Droz should be charged. They agreed upon subsection 215.50(1). Trooper McCadden then filled out and signed a criminal complaint charging plaintiff with a violation of N.Y. Penal Law § 215.50(1).

According to Herder, she did not speak to Trooper McCadden until he called to consult her about the proper section of the criminal code with which to charge plaintiff. Herder states that she did not observe Droz in the Town Hall or courtroom. She further insists that she was not the complainant with regard to the contempt charge brought against Droz.

The parties agree that after filling out the complaint against plaintiff at the barracks, Trooper McCadden

returned him to the courtroom in the Town Hall. Herder arraigned plaintiff on the contempt charge and set bail in the amount of $ 500.00 cash. She set August 27, 2002, for plaintiff's next appearance before her. Droz failed to post bail and was held in the county jail until he was returned to court for the August 27 appearance. Assistant public defender Tina Hartwell ("Hartwell") appeared in court, purportedly representing Droz. Herder adjourned the criminal contempt complaint in contemplation of dismissal. Plaintiff was released from custody.

On August 30, 2002, Anderson withdrew one of the zoning violations. Herder disqualified herself from hearing the remaining two outstanding zoning violations.

Plaintiff asserts that Hartwell did not represent him, and, in fact, he did not qualify for representation by the public defender. According to plaintiff, Hartwell never spoke to him about disposition of the charges, and he did not agree to an adjournment in contemplation of dismissal.

The Judicial Conduct Commission investigated Herder's handling of the Droz matter. On August 16, 2004, the Judicial Conduct Commission publicly censured Herder for her conduct.

III. *STANDARDS*

A. *Summary Judgment*

Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986). The moving party carries the initial burden of demonstrating an absence of a genuine issue of material fact. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). Facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

When the moving party has met the burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S. Ct. at 1356. At that point, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56; *Liberty Lobby, Inc.*, 477 U.S. at 250, 106 S. Ct. at 2511; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S. Ct. at 1356. To withstand a summary judgment motion, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. *Liberty Lobby, Inc.*, 477 U.S. at 248-49, 106 S. Ct. at 2510; *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S. Ct. at 1356.

B. *Substantive Claims*

1. *False Arrest*

The elements of a false arrest claim are intentional confinement, without consent, and without a justification such as probable cause to arrest. *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004). Probable cause exists "when the arresting officer has 'knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable

caution in the belief that the person to be arrested has committed or is committing a crime.'" *Id.* (quoting *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996).

2. ***Malicious Prosecution***

The elements of a malicious prosecution claim are: (1) the commencement or continuation of a criminal proceeding by the defendant against plaintiff; (2) the proceeding terminated in favor of the plaintiff; (3) lack of probable cause for commencing or continuing the action; and (4) the defendant acted with malice. *Rothstein v. Carriere*, 373 F.3d 275, 282 (2d Cir. 2004); *Cook v. Sheldon*, 41 F.3d 73, 79 (2d Cir. 1994). An adjournment in contemplation of dismissal defeats a malicious prosecution claim because it is not a favorable termination. *Rothstein*, 373 F.3d at 287.

3. ***Equal Protection***

An equal protection claim will lie where there is an allegation that the plaintiff was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech* 528 U.S. 562, 564, 120 S. Ct. 1073, 1074, 145 L. Ed. 2d 1060 (2000) (per curiam). The intent of equal protection "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination." *Id.*, 120 S. Ct. at 1075.

4. ***Conspiracy to Violate Civil Rights***

In order to sustain a conspiracy claim, a plaintiff must establish "(1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Pangburn v. Culbertson*, 200 F.3d

65, 72 (2d Cir. 1999). Due to the secretive nature of conspiracies, direct evidence may not be available; therefore, circumstantial evidence may suffice to prove such a claim. *Id.*

IV. *DISCUSSION*

A. *Anderson*

Plaintiff did not oppose the motion for summary judgment with regard to Anderson. Accordingly, the complaint will be dismissed as against him.

B. *Trooper McCadden*

Trooper McCadden argues that the false arrest claim against him must be dismissed because he had probable cause to arrest plaintiff, by virtue of a conversation with Herder upon his arrival at the town hall during which Herder told him that she had charged plaintiff with criminal contempt. He asserts that Herder, as Town Justice, had authority to charge Droz with criminal contempt, in fact she was the only one in attendance with that authority, and that she was the complainant providing the basis for the charging Information that he swore out.

However, the facts must be viewed in the light most favorable to plaintiff as the nonmovant. In order to do so, Herder's account of the incident must be credited. According to her, she did not observe plaintiff's conduct, she did not summon the State Police, she did not direct Trooper McCadden to arrest plaintiff, and she was not the complainant providing the basis for the contempt charge. Under this version of the circumstances, it could not be said that Trooper McCadden had probable cause to arrest Droz. This is so particularly in light of Trooper McCadden's admissions that he

did not observe contemptuous behavior by plaintiff and he determined immediately after handcuffing plaintiff that the tape recorder and notebook secreted in the bag were not dangerous.

Plaintiff has raised a genuine issue of fact as to whether Trooper McCadden had probable cause to arrest him. If the jury should determine that probable cause did not exist, then they could find Trooper McCadden liable for false arrest.

Trooper McCadden argues that the malicious prosecution claim against him must be dismissed. It is undisputed that the charge against plaintiff was adjourned in contemplation of dismissal. This disposition ordinarily defeats a malicious prosecution claim. However, plaintiff claims that he did not agree to the disposition of adjournment in contemplation of dismissal. Therefore, because an issue of fact exists regarding the validity of the adjournment in contemplation of dismissal, the malicious prosecution claim cannot be dismissed. *See Freedman v. Monticello Police Dep't,* No. 01 Civ. 0119(NRB), 2003 U.S. Dist. LEXIS 627, 2003 WL 135751, at *2 (S.N.D.Y. Jan. 17, 2003)(finding that where plaintiff "adamantly maintain[ed]" that he did not consent to adjournment in contemplation of dismissal, an issue of fact was created that prevented dismissal of the malicious prosecution claim).

Trooper McCadden argues that what plaintiff seeks with this argument is, essentially, an appeal of the state court disposition of the charge against him, which is prohibited by *Rooker-Feldman. See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S. Ct. 149, 150, 68 L. Ed. 362 (1923). In order for *Rooker-Feldman* to apply, the plaintiff must have lost his state court case, he must be

complaining of "injuries caused by [the] state-court judgment," he must be asking the federal court to consider and reject the state court judgment, and the state court judgment must have preceded the federal court case. *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 85 (2d Cir. 2005). Here, the criminal charges against Droz were dismissed. It cannot be said that he "lost" in state court. Next, Droz does not complain of any injury caused by the dismissal of the charges against him. Rather, he complains that the charges were improperly brought at the outset. Third, plaintiff is not asking that the state court judgment dismissing the charges against him be rejected. Rather, he wishes to avoid an automatic finding that the adjournment in contemplation of dismissal precludes him from establishing that the proceeding terminated in his favor. Thus, although the state court judgment preceded this federal action, the other three requirements for application *Rooker-Feldman* are not met.

McCadden next argues that plaintiff cannot establish the malice element. However, viewing the facts in the light most favorable to Droz, and making all inferences in his favor, based upon the alleged ex parte conversations and lack of any evidence that Droz had committed criminal contempt (if Herder's version is credited as it must be on this motion), a reasonable jury could infer that McCadden acted with the required malice. *See Martin v. City of Albany*, 42 N.Y.2d 13, 17, 364 N.E.2d 1304, 396 N.Y.S.2d 612 (N.Y. Ct. App. 1977) (noting that "probable cause to initiate a criminal proceeding may be so totally lacking as to reasonably permit an inference that the proceeding was maliciously instituted"). McCadden also argues that a break in the chain of causation occurred when plaintiff was arraigned.

However, it is undisputed that McCadden swore out the complaint upon which plaintiff was arraigned, thus initiating the prosecution. This is sufficient to withstand summary judgment.

Interestingly, had plaintiff brought false arrest/malicious prosecution claims against Herder, [1] a converse view of the facts would have been required. In other words, in assessing a motion for summary judgment on a false arrest/malicious prosecution claim against Herder, the facts viewed in the light most favorable to plaintiff would require crediting Trooper McCadden's versions of event. In that event, summary judgment in favor of Herder would not be appropriate because questions of fact would exist as to whether her directing plaintiff's arrest and continuing the prosecution against him were baseless and outside of her authority.

McCadden argues that the equal protection claim against him must be dismissed because plaintiff has elicited no facts that he was treated differently from someone similarly situated. Droz has not set forth any facts to establish that he was treated differently from someone similarly situated. Thus, the equal protection claim must be dismissed.

Finally, McCadden argues that he is entitled to qualified immunity. However, the existing questions of material fact as outlined above foreclose a grant of summary judgment.

C. *McCadden and Herder--Conspiracy Claims*

Defendants argue that because the underlying claims (false arrest, malicious prosecution) must be dismissed, a conspiracy claim will not lie. However, as set forth above, the underlying claims will not be dismissed on

summary judgment. Further, Droz has set forth facts, again taken in the light most favorable to him, sufficient to withstand summary judgment on the conspiracy claims, such as the multiple ex parte conversations between McCadden and Herder both prior and subsequent to plaintiff's arrest. Accordingly, the conspiracy claims will not be dismissed.

V. *CONCLUSION*

Anderson will be dismissed as a defendant, as plaintiff failed to oppose the motion as to him. Droz has established questions of material fact precluding summary judgment on the false arrest and malicious prosecution claims against McCadden. Plaintiff has not set forth any facts to support his equal protection claim against McCadden. McCadden and Herder are not entitled to summary judgment on the conspiracy claims against them because the underlying claims are not being dismissed, and because plaintiff has adduced facts from which a jury could determine that McCadden and Herder conspired to violate his constitutional rights.

Accordingly, it is

ORDERED that

1. Defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART;

2. Counts 1 and 4 of the Amended Complaint are DISMISSED;

2. Count 2 and 3 (against defendant Trooper P.J. McCadden) and Claim 5 (against defendants McCadden and Shirley Herder) remain pending for trial; and

4. The defendant Estate of John Anderson is DISMISSED in the entirety.

IT IS SO ORDERED.

/s/ David N. Hurd

United States District Judge

Dated: January 7, 2008

Utica, New York.

Footnotes

1 It is somewhat surprising that these claims were not brought against Herder, since she would not be entitled to judicial immunity for acts such as these, clearly in absence of jurisdiction and without basis in law.

Docket No. 08-0241-cv(L), 08-0567-cv(con)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARTIN DROZ, Plaintiff-Appellee,

- v. -

P.J. MCCADDEN, State Trooper, Defendant-Appellant,

SHIRLEY B. HERDER, MARK MURRAY, ESTATE OF JOHN C. ANDERSON, TOWN OF VIENNA, NEW YORK, DANIEL G. MIDDAUGH, SCOTT BURNOP, MICHAEL DURANT, SHAWN MALONE, MICHAEL MULKY, MARK SLAWSON, and UNKNOWN SOWITCH, Defendants.

Martin Droz having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By:
Frank Perez, Deputy Clerk